SUPREME COURT, U. S.

IN THE

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MICHAEL RODAK, JR., CLERK

Supreme Court of the United States

October Term, 1973

No. 73-970

DERICKSEN M. BRINKERHOFF
and the MEMBERS OF THE CLASS,
Petitioners,

v.

AMFAC, INC.,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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A. Introduction

Petitioners do not seek review of the appraisers' valuation determination; in fact, they would concede that if the appraisals had been performed in the manner instructed, the values would have been final and binding. It is manifest, however, that in the case at bar, the appraisers completely disregarded the instructions and thus petitioners never received the appraisals for which they bargained in the settlement. And thus, as stated in the Petition, the issue here is whether it is not error for a court to approve an appraisal made contrary to and in violation of the detailed instructions to the appraisers, and whether the decision reached by the Ninth Circuit is not in direct conflict with the decision of the Court of Appeals for the District of Columbia, *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958).

Amfac's position that, in the settlement agreement, petitioners waived judicial review of whether the appraisers complied with the mandatory, jointly-drafted instructions was expressly rejected by the Ninth Circuit and is patently frivolous.[1] Surely, if instead of appraising the value of the assets of the three plantations involved in this action, the appraisers, through inadvertence, ignorance, negligence, fraud or otherwise, violated their instructions and appraised the value of the assets of three different plantations, even Amfac would agree that such appraisals could and should be set aside by the courts. The appraisers' failure herein to appraise the value of 92% of the land of one plantation and 50% of the land of another (Petition, p. 10 n.8) is no less prejudicial to petitioners. This is precisely the kind of question which Chief Justice Warren

1. See the *per curiam* Memorandum of the Ninth Circuit (in the Appendix ["App."] to the Petition, at pp. A1-A2) denying Amfac's motion to dismiss which was predicated exclusively upon the above contentions. The Ninth Circuit also denied Amfac's request to tax petitioners for the cost of the motion to dismiss because "the motion was not successful."

Burger, while sitting as a judge of the United States Court of Appeals for the District of Columbia Circuit, held to be subject to *de novo* review by a court of appeals, notwithstanding an agreement that the appraisers' value determinations would be final and binding. *Marceron v. Chevy Chase Services, Inc., supra.*[2]

B. This Case Raises Important Federal Questions Which Have a National Effect Upon Settlements of Federal Securities Class Actions.

Review by this Court of the case at bar is of exceptional importance to the overburdened federal judiciary, to the national corporate community, to the federal securities law bar and to the administration and enforcement of the federal securities laws because the manifest injustice created by the decisions below will preclude the avoidance of protracted and expensive jury trials of securities cases by means of the efficient, fair and economical settlement mechanism achieved herein.

All parties recognized that the value of the many thousands of acres of Hawaiian real estate owned by the plantations was, in the words of Amfac, the "ultimate principal issue" of the case. (Petition, p. 5.) Accordingly, after petitioners' motion for summary judgment on liability was granted finding Amfac guilty of securites law fraud, the parties agreed that, in lieu of separate jury trials on the issue of damages as to each of the three plantations herein, the value of the plantations' stock would be appraised by an independent investment banker, assisted by an independent *Hawaiian real estate* appraiser, *pursuant to mandatory written instructions* **jointly drafted** and agreed upon by the parties. The importance of the value of the real estate

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2. Amfac concedes at page 20 of its brief that the Ninth Circuit did not review *de novo* the appraisers' interpretation of their instructions as required by *Marceron*.

to the appraisal of the value of the plantations' stock was highlighted by the individualized attention which the parties gave in the instructions to the real estate and to the duties of the independent real estate appraiser (App., pp. A25-A27):

> "The settlement of this action provides that the value of the common stock of the Plantations shall be reappraised by an independent investment banker, who **in light of the substantial real estate holdings** and leaseholds of the Plantation companies, **shall** be assisted by an **independent real estate appraiser.**"
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> * * *
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> "Mr. Root, it is your duty, as the real estate appraiser, to **appraise the value** of such of the real estate of each of the three Plantations as directed by Eastman Dillon for Eastman Dillon's use in the consideration of net asset value. Although you are to perform your appraisal under the direction of Eastman Dillon, **you are to reach your own independent judgment as to the value of the real estate appraised** and you are to perform your appraisals in the ordinary, customary and usual manner recognized by your profession." (Boldface added.)

The investment banker was expressly instructed in mandatory language that, in appraising the value of the stock, he was required to rely upon the real estate values determined by the real estate appraiser (App., p. A26):

> "You shall consider all relevant value criteria which shall include but not necessarily be limited to market price, net asset value and investment value. In the consideration of net asset value you **shall** utilize the services of Gilbert W. Root, MAI, of Honolulu, Hawaii as *real estate appraiser* who, under your super-

> vision, **shall appraise the value** of such of the real estate of each of the three Plantations as is directed by you."[3] (Italics and boldface added.)

That the *jointly drafted* instructions were disregarded and that petitioners never received the appraisals for which they bargained cannot be denied. Despite the mandatory instruction to the real estate appraiser that "you are to reach your own independent judgment as to the value of the real estate appraised," Root admitted that he never appraised the value of any of the thousands of acres of land employed in sugar operations (Petition, p. 12), and this vital fact *has never been denied by Amfac*. Thus, even today, the value of the real estate employed in sugar operations, which Amfac itself characterized as the "ultimate principal issue" of the case, is unknown and unaccounted for. As District Judge Pence recognized (Petition, p. 13):

> "THE COURT: I'll state frankly, there is no one in the courtroom who knows what the 29,000 acres of Lihue would be worth. On all of the evidence before me, that's the only conclusion."[4]

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3. As set forth in the Petition (at pp. 8-9) and not denied by Amfac, "net asset value" as used in the settlement agreement and instructions was understood by all parties to mean "theoretical liquidation value." Also, Root was directed by Eastman Dillon to appraise *all* of the real estate of the three plantations. (Petition, p.8 n.6.)

4. Without denying that the appraisers failed to appraise the value of the real estate employed in sugar operations, Amfac now contends (at pp. 10-11) that the appraisers were required only to "consider" such value and were not required to "include" any element of such value in the appraised value of the plantations' stock. Even if Amfac were correct, the appraisers clearly could not have even "considered" the value of the real estate when that value was—indeed, still is—unknown. Significantly, however, although for obvious reasons it now seeks to reverse its position, Amfac conceded below that the value of the real estate must not only be "considered" by the appraisers, but must also be given *some*

An essential element of the settlement bargained for by the petitioners was the real estate appraisal function to be performed by Root, an MAI of Honolulu, Hawaii. Root admittedly abdicated that function and performed no real estate appraisal on any of the sugar lands, even though he admittedly "could have done so" (Petition, p. 12 n.11) and even though he was expressly instructed to do so. (Petition, pp. 7-8.) Despite the carefully drafted instructions, the petitioners received only a mathematical exercise in earnings multiples, based upon an earnings figure which the appraisers admitted was "pulled . . . out of the air." (Tr., December 4, 1972, at p. 182.) None of the elaborate procedure for instructing the appraisers would have been necessary if the parties or District Judge Tavares had intended such an unfair result.[5] That the appraisals would simply be an exercise for the calculation of an earnings multiple was unthinkable.

Thus, not one penny of credit was accorded by the appraisers for the thousands of valuable acres in sugar pro-

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weight, and that the Delaware cases so holding were controlling. (Rec., pp. 5802-04; Petition, p. 9.) *See, e.g., Poole v. N.V. Deli Maatschappij*, 243 A.2d 67 (Sup. Ct. Del. 1968); *Swanton v. State Guaranty Corp.*, 215 A.2d 242 (Del. Ch. Ct. 1965).

Sterling v. Mayflower Hotel Corp., 93 A.2d 107 (Sup. Ct. Del. 1952), which is the sole case cited by Amfac (at pp. 11-12) and which was decided sixteen years prior to the Delaware Supreme Court's recent decision in *Poole v. N.V. Deli Maatschappij, supra*, is totally inapposite. The plaintiffs in *Mayflower* were complaining because the appraiser had performed no liquidation value appraisal of the assets of *Hilton*, the company which was acquiring Mayflower, not because he failed to appraise the liquidation value of the assets of *Mayflower* in which the plaintiffs held shares. In the context of the case at bar, this would be equivalent to petitioners complaining that the appraisers failed to value the assets of *Amfac*, which would be patently irrelevant since the settlement provided that market value of Amfac stock as of January, 1969 would prevail.

5. Although Judge Tavares had presided over all proceedings prior to the hearings on petitioners' motion to set aside the appraisals, Judge Pence replaced Judge Tavares, who was ill, for the hearing on petitioners' motion. See Petition, p. 11.

duction because *no real estate appraisal* was ever performed to determine the value of a single acre. The appraisers did not—and still do not—know the real estate appraisal value of the sugar lands, which was—and still is—the ultimate principal issue of the case.

The efficient and economical method of determining damages agreed upon by the parties herein is a model which could significantly reduce the time and resources which the federal courts and litigants must now expend on federal securities class action litigation. The settlement mechanism fashioned herein, utilizing mandatory, jointly drafted instructions to appraisers, could readily be adapted to the particular issues of any securities case, just as it was structured for resolution of the particular issues in this case. Its economy and efficiency are manifested not only by the elimination of jury trials, but by the avoidance of time-consuming and expensive discovery by the parties on the issue of damages which is required when a settlement embodies a compromise as to the amount of damages. See, e.g., *Percodani v. Riker-Maxson Corp.*, 50 F.R.D. 473 (S.D.N.Y. 1970). The settlement fashioned herein involved no compromise as to damages by any party, as Amfac recognizes (at p. 23).

Such settlements will only be considered, however, if the parties are assured that the instructions negotiated by them will be strictly enforced. Neither shareholders nor corporations can be expected to agree in the future to settlements providing for appraisals pursuant to jointly drafted instructions if courts permit appraisers, as did District Judge Pence in his reported decision, to disregard the instructions and to proceed as they, in their unfettered discretion, might choose.[6]

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6. The power given the appraisers to reject comments of the parties clearly did not include the power to ignore their instructions, as suggested by Amfac (at p. 20).

C. The Decision Of The Ninth Circuit Is In Conflict With The Decision Of The District Of Columbia Circuit.

Amfac concedes (at p. 20) that the Ninth Circuit did not review *de novo* the appraisers' interpretation of their instructions as contemplated by Judge (now Chief Justice) Burger in *Marceron v. Chevy Chase Services, Inc.*, 258 F.2d 155 (D.C. Cir. 1958).

However, Amfac attempts to distinguish away this clear conflict between the circuits on the grounds that: (1) in the instant case, the parties allegedly vested "final authority" in the appraisers and, therefore, the courts may not review whether the appraisers adhered to their mandatory instructions, and (2) review by the courts is a discretionary function.

Here, as in *Marceron*, the appraisers were appointed and were granted final and binding power "solely to appraise value," *not to interpret their instructions*. Judge Tavares instructed the appraisers:

> "The purpose of this hearing is to appoint Eastman Dillon, Union Securities & Co. and Gilbert W. Root, as officers of this Court to perform independent appraisals *of the value* of the capital stock of the Lihue Plantation Co., Ltd., Puna Sugar Co., Ltd. and Kekaha Sugar Co., Ltd. (which I shall hereinafter refer to as the 'Plantations') in accordance with the settlement of this action and to instruct the Court's appraisers as to the scope of their duties and the manner in which they **shall** perform them." (App., p. A25.) (Italics and bold face added.)
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> * * *
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> "Your duties are as follows:
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> "It is the duty of Eastman Dillon, as the investment banker, to appraise *the value of* a share of capital stock of each of the three Plantations as of January 1, 1969. . . ." (App., p. A26) (Italics added.)
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> * * *

> "Mr. Root, it is your duty, as the real estate appraiser, to appraise *the value of* such of the real estate of each of the three Plantations as directed by Eastman Dillon for Eastman Dillon's use in the consideration of net asset value." (App., p. A27.) (Italics added.)
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> * * *
>
> ". . . Absent fraud, your final decision **as to the determination of the fair value** of a share of the capital stock of the Plantation companies will be final and binding upon the parties and non-appealable." (App., p. A27 (Boldface added.)

Thus, here as in *Marceron*, the appraisers' erroneous interpretation of their instructions is not binding upon the parties, but is a question "purely of law" subject to *de novo* judicial review.

Amfac's characterization of Chief Justice Burger's decision as rendering review by the trial and appellate courts discretionary is patently erroneous. In the language of *Marceron* (255 F.2d at 158):

> "[Appraisers] do not bind principals or contracting parties when they go beyond the authority delegated to them. When they exceed that authority their decision in the area of that departure is not binding; *their interpretation of their charter of authority, unlike the valuation, is subject to* [*de novo*] *judicial review.*" (Italics added.)

That review was not held discretionary in *Marceron* is manifested by the fact that Chief Justice Burger *reversed* the trial court without any discussion of whether the trial court had abused its discretion or committed clear or fundamental error.

Thus, it is clear that the refusal of the Ninth Circuit to review *de novo* whether the appraisers performed their appraisals in accordance with their instructions is in direct conflict with the decision of the District of Columbia Circuit in *Marceron*.

D. The Decisions Below Would Frustrate The Important Public Policy of Compelling Full Disgorgement.

As set forth in the Petition (at pp. 18-21), the decisions below would permit Amfac, a party found guilty of securities law fraud, to retain the multimillion dollar bounty of its fraud.

In a disingenuous attempt to minimize the extent of the illegal windfall it has reaped, Amfac makes the incredible argument (at pp. 12-13) that, since the minority shareholders of the plantations received Amfac stock for their plantation stock, "it is difficult to understand how, if Amfac received a windfall from the merger, petitioners would not have received a similar windfall."

Amfac's difficulty is obviously transparent. If the plantations' stock had not been grossly undervalued by excluding, *inter alia*, any credit for the extraordinarily valuable real estate employed in sugar operations, the minority shareholders would have received substantially more Amfac stock than they actually received as a result of the mergers. Moreover, Amfac's illegal windfall from acquiring the plantations at a fraction of their actual value is diluted among *all* Amfac shareholders,[7] not just the plantations' minority shareholders.

Thus, Amfac's contention (at p. 13) that "[i]f, in fact, Amfac received a bargain, petitioners received the same bargain and share *pro rata* in the benefits, since they now hold Amfac stock," is patently frivolous.

E. Petitioners Were Denied A Hearing On The Issue of Whether The Appraisals Were Tainted By Fraud.

Amfac asserts (at p. 15) that, at the hearing below on petitioners' motion to set aside the appraisals, petitioners

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7. As of January 1, 1969, Amfac had outstanding in excess of 4,250,000 shares of common stock whereas the minority shareholders of the Lihue and Puna plantations received less than 68,000 Amfac shares as a result of the mergers.

"submitted no evidence of fraud nor did they allege a single fact which, if true, would have tended to establish fraud." As set forth in the Petition (at pp. 13, 20), petitioners made a *prima facie* showing in their offer of proof that Amfac made numerous material representations to the appraisers which were flatly contradicted by Amfac's own documents and records. Yet, Judge Pence refused to allow petitioners to introduce into evidence any of the contradictory Amfac documents or to examine or depose Amfac officials to prove the fraudulent nature of its misrepresentations. If Amfac failed to disclose or misrepresented material facts which were relied upon by the appraisers, then the appraisals would be tainted by actual or constructive fraud and must be set aside.

Amfac's contention that petitioners conceded below that they could not show "venal" fraud is false and misleading. As the quotation at page 15 of Amfac's brief demonstrates, only the appraisers were exonerated of "venal" fraud, *not Amfac*.[8]

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8. Amfac omits the very next sentence wherein petitioners' counsel stated: "[The appraisers] have, on the other hand, been guilty of constructive fraud; constructive fraud in the nature as defined by the *Von Holt* [*v. Izumo Taisha Kyo Mission*, 42 Haw. 671 (1958)] case, which we discussed in our brief, and that does not imply nor is it intended to imply that that is the kind of fraud which involves any maliciousness or any immorality or any unlawful intent." (Tr., December 4, 1972, at p. 450.) Similarly, Amfac takes completely out of context the quoted excerpt at page 27 of its brief from the hearing of August 18, 1972. That hearing, held *before* the appraisers had submitted any report to the Court or the parties, was on petitioners' motions to enjoin another party from prosecuting, *in separate litigation in a different forum*, his charge that petitioners' counsel had entered into a conspiracy with the appraisers and with Amfac to defraud the minority shareholders by agreeing upon artificially low appraisals. (See Rec., pp. 5572-634.) Such charge against petitioners' counsel was obviously baseless, as was subsequently admitted in open court by the party who had made said charge. (Tr., December 6, 1972, at pp. 4-5.)

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of February, 1974, three copies of this Reply Brief were served, by first class air mail, postage prepaid, on the attorneys for respondent Amfac, Inc. I further certify that all parties required to be served have been served.

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